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IN THE

Supreme Court of the

OCTOBER TERM,

No. 595

ALICE SCHURIN

vs.

CITY OF CHICA

RESPONDENTS' BRIEF

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICA

Office-Supreme Court, U.S.
FILED
NOV 9 1964
JOHN F. DAVIS, CLERK

. U. S.

United States

1964.

A, ET AL.,
Petitioners.

), ET AL.,
Respondents.

N OPPOSITION.

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IN THE

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OCTOBER TERM, 1964.

No. 595.

ALICE SCHURINGA, ET AL.,

Petitioners,

vs.

CITY OF CHICAGO, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION.

OPINION BELOW.

The opinion of the Illinois Supreme Court is correctly cited by petitioners as *Schuringa, et al.* v. *City of Chicago, et al.*, 198 N. E. 2d 326 (1964) and is set forth in full as Appendix "A" of their petition (Petition for Writ of Certiorari, p. 2 and App. 1). The official citation of this opinion in the Illinois Reports is 30 Ill. 2d 504 (1964).

QUESTIONS PRESENTED.

1. May an individual not a party to the trial and appeal below petition for writ of certiorari before this Court?

2. Did the Illinois Supreme Court properly refuse to consider the issue of whether increasing the amount of fluorine already present in the water supply of the City of Chicago violates freedom of religion as guaranteed by the First Amendment to the United States Constitution?

3. Does increasing the amount of fluorine already present in the water supply of the City of Chicago violate due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution?

4. Has increasing the amount of fluorine already present in the water supply proved to reduce tooth decay without adverse physical side effects?

REASONS FOR DENYING THE WRIT.

I.

An individual not a party to the trial and appeal below may not petition for writ of certiorari before this court.

Jose M. Lenone was not a party in the trial court below. Nor was he a party to the appeal before the Illinois Supreme Court. *Subsequent* to the filing of the briefs and oral argument, Lenone sought leave of the Illinois Supreme Court to intervene therein (Petition for Writ of Certiorari, App. 16). Leave to intervene was denied by the full court on January 21, 1964, and the court rendered its decision on March 18, 1964.

Both in the title of the petition for writ of certiorari and in the argument therein, Lenone purports to be a petitioner. The record is clear that he is not such. Thus, any contention now raised by Lenone should be disregarded by this Court. C. J. S. Federal Courts, § 273 (1960).

Assuming *arguendo* that Lenone is not estopped from arguing before this Court that his petition to intervene before the Illinois Supreme Court was erroneously denied, an examination of the Illinois statute relating to intervention is in order. The appropriate statute is Section 26.1 of the Illinois Civil Practice Act (Ill. Rev. Stat. 1963, ch. 110, par. 26.1), set forth in part by petitioners (Petition for Writ of Certiorari, App. 34). This statute clearly states that leave to intervene is not a matter of right, but is solely "*at the discretion*" of the court. The denial of Lenone's petition, presented after briefs had been filed and oral argument held, was not an abuse of discretion by the court below. *Cf. Jackson* v. *Pioletti*, 346 Ill. App. 569,

105 N. E. 2d 779 (1952). Moreover, intervention is a matter of state practice and procedure, which this Court will not review. *Cf. Zorach* v. *Clausen*, 343 U. S. 306 (1952).

For these reasons, Lenone is not a proper petitioner before this Court and the contentions raised by him should not be considered.

II.

The Illinois Supreme Court properly refused to consider the issue of whether increasing the amount of fluorine already present in the water supply of the City of Chicago violates freedom of religion.

Petitioners argue that the court below erred in not considering the contention of Walter Olson that the water fluoridation program of the City of Chicago is in violation of the First Amendment to the United States Constitution. This contention was raised solely by Olson in the court below; it was not raised by the other petitioners. On December 18, 1963, Olson sought leave to dismiss his appeal *as a result* of his consultation with The First Church of Christ, Scientist, in Boston, Massachusetts. See Respondents' Appendix A. On January 2, 1964, the Illinois Supreme Court allowed Olson leave to dismiss his appeal. Shortly thereafter Olson died, and his attorney, William C. Wines, at "the request of the Legal Department of the First Church of Christ, Scientist, in Boston, Massachusetts" suggested to the Illinois Supreme Court that Olson was dead and "that therefore this appeal has abated and become moot so far as he is concerned." See Respondents' Appendix B.

Since Olson requested prior to decision to dismiss his appeal, the Illinois Supreme Court properly ordered such dismissal. Moreover, the issue is doubly moot in that Olson died prior to decision. The Illinois Supreme Court

in the case at bar, held (30 Ill. 2d 504, at p. 508) that it "is axiomatic that this court, unless the public interest demands it, will not consider abstract or moot questions (citations omitted)". In this case, the public interest does not demand a consideration of the "religious issue" in that (1) Olson, suing as a Christian Scientist, moved to dismiss with the acquiescence of the Christian Scientist Church, (2) "mootness" was suggested by the Christian Scientist Church subsequent to Olson's death, (3) the issues raised by Olson had been unanimously decided adversely to him by other state courts.

In *Dowell* v. *Tulsa*, 273 P. 2d 859 (Okla. 1954), *certiorari* denied 348 U. S. 912, plaintiffs argued that the city fluoridation ordinance was "in violation of the 'free exercise' of religion, which, in the First Amendment of the United States Constitution, Congress is forbidden to prohibit. . . ." The court, in refuting this argument, held (p. 864) that:

> ". . . in the contemplated water fluoridation, the City of Tulsa is no more practicing medicine or dentistry or manufacturing, preparing, compounding or selling a drug, than a mother would be who furnishes her children a well-balanced diet, including foods containing vitamin D and calcium to harden bones and prevent rickets, or lean meat and milk to prevent pellagra. No one would contend that this is practicing medicine or administering drugs."

In *Readey* v. *St. Louis County Water Company*, 352 S. W. 2d 622 (Mo. 1962), the trial court enjoined the county fluoridation program on a taxpayer's petition. While appeal was pending, an *amicus curiae* brief was filed to the effect that the fluoridation ordinance "is unconstitutional because it submits Christian Scientists in St. Louis County to forced medication against their religious beliefs and thereby deprives them of their constitutional right under the First Amendment to the United States Constitution." The Court treated the issue in this manner (p. 628):

"It is suggested by inference that we may take judicial notice of the fact that it is a religious belief of Christian Scientists that no material applications for relief of disease should be employed. But if, in the public interest, we should wish to resolve the question posed in amicus' brief, even though the constitutional question was not raised below nor preserved for appellate review, and even if we should take judicial notice that the belief suggested by counsel is a religious belief of Christian Scientists, still we should not know whether, nor could we assume that, it would violate that belief for one to consume water which theretofore had contained one-half part fluoride, simply because another one-half part had been added. Furthermore, if we should assume that the fluoride ion in water constitutes medication as to the individual and if we should further assume that the ingestion of that medication violates a religious belief of any county resident, then it must follow that forced medication now exists and that the enforcement of the ordinance in question would not change the situation in that respect."

In *Chapman* v. *Shreveport*, 74 S. 2d 142 (La. 1954), *certiorari* denied 348 U. S. 892, the court treated a similar argument in the same manner (p. 146):

"Appellees contend that it is arbitrary and unreasonable to compel a person to submit to the taking of preventive medicine except for the purpose of controlling the spread of contagious or infectious diseases. Their argument is not entirely appropriate to the instant case. In the first place there is no direct compulsion on anyone to drink the water. The compulsion at most is an indirect one, but it cannot be questioned, of course, that the fluoridation is undertaken with the view that the citizens or a large majority of them will receive its benefits by drinking the public water. The witnesses from the dental profession considered that the addition of fluoride to the water was not medicating it in the generally accepted sense, but was adding to it one of the mineral properties found naturally in water in some sections of the country."

See also: *de Aryan* v. *Butler*, 260 P. 2d 98, 103 (Cal. 1953), *certiorari* denied 347 U. S. 1012; *Krause* v. *Cleveland*, 127 N. E. 2d 609, 613 (Ohio 1955), *certiorari* denied 351 U. S. 935; *Baer* v. *Bend*, 292 P. 2d 134, 136-140 (Ore. 1956).

In the Irish decision of *Ryan* v. *Attorney General* (decided July 3, 1964), the High Court of Dublin refutes petitioners' characterization of a municipal water fluoridation program as "mass medication":

> "The Court does not accept that the fluoridation of water is, or can be described as, the mass medication or mass administration of 'drugs' through water. It has already been pointed out that the fluoridation is a process by which an element which naturally occurs in water is, in the case of a particular water supply, raised to a level of concentration at which it is found in wholesome water and that the fluoride ions thus added are not different in nature or action from the fluoride ions occurring naturally in water.
>
> "This matter was examined in detail by the Commission set up by the Government of New Zealand to enquire into 'the Desirability or Otherwise of the Fluoridation of Public Water Supplies' and the conclusion was reached that 'fluoride is not a drug but a nutrient and fluoridation is a process of food fortification.' It is, in the opinion of the Court, a misuse of words to refer to this process as mass medication or mass administration of drugs."

For these reasons, the Illinois Supreme Court properly refused to consider the contention that the fluoridation program of the City of Chicago "was compulsory medication which violated the right to religious freedom."

III.

Increasing the amount of fluorine already present in the water supply of the City of Chicago is not violative of due process of law.

Petitioners argue that the exercise of police power by the City of Chicago in fluoridating its waters does not bear a proper relation to the promotion of public health and, thus, is violative of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioners' contention is a much litigated one. The court below noted (30 Ill. 2d 504, at p. 509):

> "* * * In this country, on the occasions where the matter has been subjected to judicial scrutiny, there has been unanimous accord that the fluoridation of water by one part of fluoride to a million parts of water is a reasonable and proper exercise of the police power in the interest of the public health, and that it is not subject to constitutional infirmities thus far conceived. (See: *Chapman* v. *City of Shreveport*, 225 La. 859, 74 So. 2d 142, *certiorari* denied 348 U. S. 892, 99 L. ed. 701; *Kraus* v. *City of Cleveland*, 163 Ohio St. 559, 127 N. E. 2d 609, *certiorari* denied 351 U. S. 935, 100 L. ed. 1463; *Dowell* v. *City of Tulsa* (Okla. 1954), 273 P. 2d 859, *certiorari* denied 348 U. S. 912, 99 L. ed. 715; *de Aryan* v. *Butler*, 119 Cal. App. 2d 674, 260 P. 2d 98, *certiorari* denied 347 U. S. 1012, 98 L. ed. 1135; *Froncek* v. *City of Milwaukee*, 269 Wis. 276, 69 N. W. 2d 242; *Readey* v. *St. Louis County Water Co.* (Mo. 1961), 352 S. W. 2d 622; *Baer* v. *City of Bend*, 206 Ore. 221, 292 P. 2d 134; *Kaul* v. *City of Chehalis*, 45 Wash. 2d 616, 277 P. 2d 352; *City of Fort Pierce* v. *State ex rel Altenhoff* (Fla. 1962), 143 So. 2d 879. *Cf. Wilson* v. *City of Council Bluffs* (253 Ia. 162), 110 N. W. 2d 569). On the other hand, we are told in plaintiffs' brief that the highest courts of Canada and Sweden have ruled against fluoridation, the former apparently concluding that such a

program was beyond the statutory authority of municipalities (*Municipality of Metropolitan Toronto* v. *Village of Forest Hill* (1957), 9 D. L. R. 2d 113), and the latter apparently concluding, among other things, that there were possibilities of risk and disadvantage to health. (*Association for Promotion of Health* v. *Town of Norrkopping* (Sweden, 1961). The High Court of Dublin, Ireland, to the contrary, shares the American view to date that fluoridation of public waters is neither physically harmful nor legally improper. *Ryan* v. *Attorney General* (1963)."

The evidence in the court below was to the effect that drinking fluoridated water benefits growing children by rendering their teeth decidedly less vulnerable to decay and that this benefit lasts throughout a lifetime. Dentists are not in dispute that tooth decay is a disease which may manifest symptoms throughout the anatomy. The fact that dental caries is not a *communicable* disease that can cause an epidemic does not detract from its seriousness as affecting the public health of the inhabitants of the City of Chicago. Thus, the City's fluoridation program bears a reasonable relation to the public health and is a valid exercise of its police power.

IV.

Increasing the amount of fluorine already present in the water supply reduces tooth decay without adverse side effects.

Petitioners argue that water fluoridation is not beneficial and is, perhaps, harmful (Petition for Writ of Certiorari, p. 28). Evidence adduced in the court below and before other courts is to the contrary on both counts.

The court below, after carefully scrutinizing the scientific evidence contained in the voluminous trial record, concluded (30 Ill. 2d 504, at p. 516):

"From all of the evidence in this record, as well as the scientific, professional and legal authorities which have been brought before us, there appears to be extraordinary accord that fluorides act to prevent and reduce tooth decay, and that artificial fluoridation to the extent of one part per million parts of water will not, either presently or cumulatively, result in harmful systemic effects. Apart from the extensive scientific research which led to these conclusions, equally impressive are the painstaking legislative inquiries at Federal, State and local levels which have preceded the endorsement and adoption of fluoridation programs. As we see it, the closest factual issue arises over the question whether artificial fluoridation, to the extent here involved, will in fact produce what could be described as harmful effects in the matter of mottled teeth. At best, however, the evidence with respect thereto presents only a debatable question where there is room for difference of opinion, and while it is our belief the proof is more susceptible to a conclusion that severe and disfiguring endemic dental fluorosis will not result from artificial fluoridation to the extent practiced here, it is enough to say it is an area in which the legislative judgment must prevail. We conclude that the artificial fluoridation of water is reasonably related to the public health, and that the program adopted by Chicago is necessary and suitable for the protection of public health."

The conclusions of all other state tribunals considering this issue have been the same. See cases cited in Point III herein.

CONCLUSION.

This Court has refused certiorari on at least four other occasions when the issues set forth herein by petitioners have been presented to it. Petitioners' contentions are merely restatements of arguments made and uniformly rejected in these prior cases. The petition states no new basis for the granting of the writ of certiorari.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX A.

Motion of Walter Olson to dismiss Appeal and Verified Suggestions in support thereof filed on December 18, 1963, which, omitting caption and signatures, are as follows:

MOTION TO DISMISS APPEAL.

Walter Olson, by William C. Wines, his attorney, moves this Court for leave to dismiss his appeal in this case and to consent to any judgment that may be rendered against him for costs on the cross-appeal of the City of Chicago.

Verified Suggestions in support of this Motion are appended hereto.

VERIFIED SUGGESTIONS.

WALTER OLSON, sworn, says that:

1. When he was requested and thereupon consented to become a plaintiff in this case, he had not consulted with The First Church of Christ, Scientist, in Boston, Massachusetts, he being an adherent of the Christian Science faith, concerning this case.

2. He has recently conferred with the General Counsel for and other members of The First Church of Christ, Scientist, in Boston, Massachusetts, and as a result of that conference and other considerations desires to withdraw his appeal from the Final Decree in this case and to consent to any judgment for costs that may be rendered upon the cross-appeal of the City of Chicago.

RESPONDENTS' APPENDIX B.

Suggestion of Death of Walter Olson filed on January 8, 1964, which omitting caption and signatures, is as follows:

WILLIAM C. WINES, sworn, says that:

1. He was engaged by Walter Olson, one of appellants in the above-entitled case, to file a motion to dismiss this appeal, which motion is now pending and undisposed of before this Court.

2. Since the filing of that motion Walter Olson has been killed in an automobile accident.

3. This affiant does not represent the estate of Walter Olson, but has been requested by the Legal Department of The First Church of Christ, Scientist in Boston, Massachusetts to suggest his death and to suggest that therefore this appeal has abated and become moot so far as he is concerned.